(9)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 338

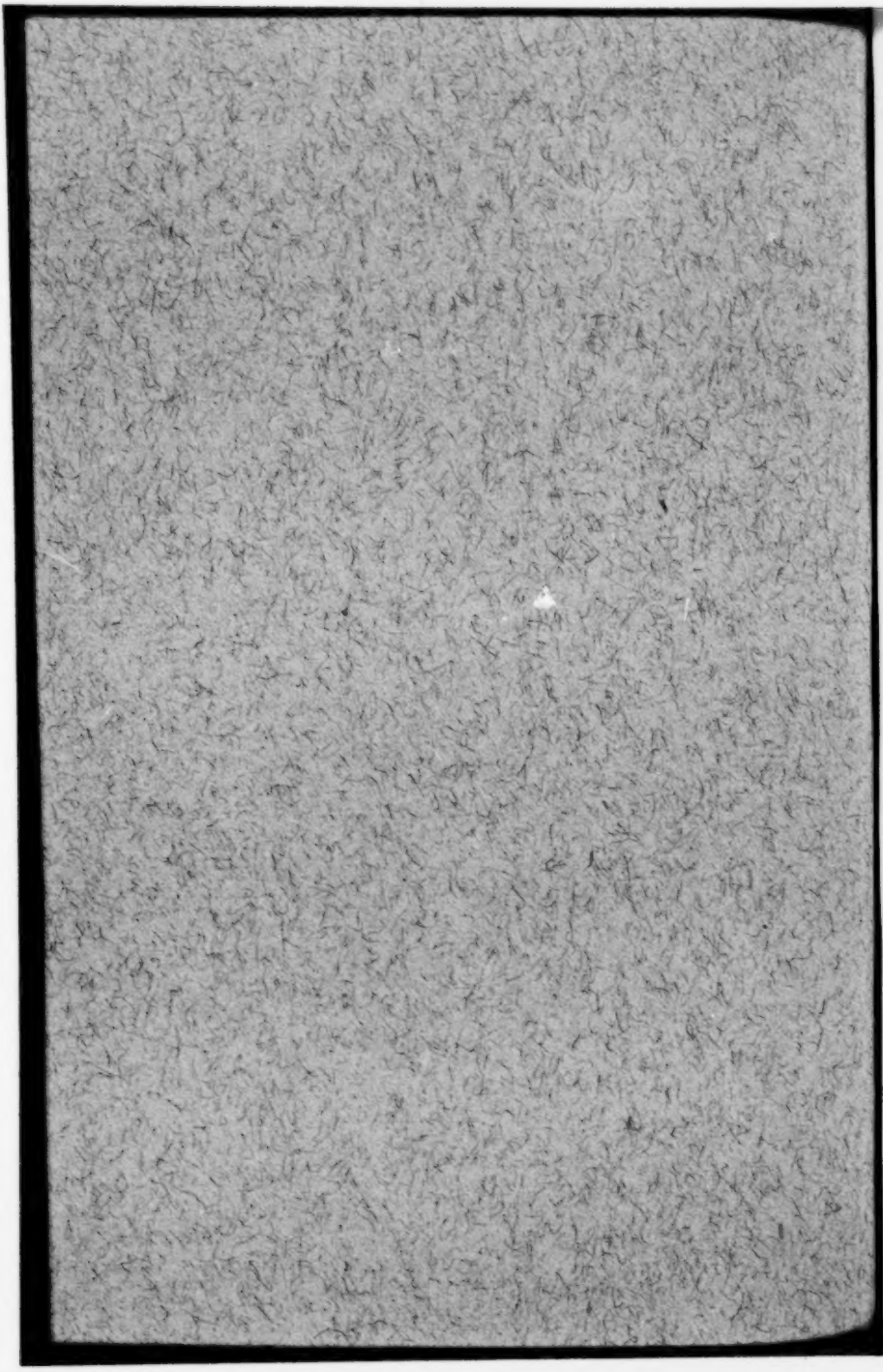
FRANK A. BERRY AND MILLER WALTON,
Petitioners,

vs.

C. J. ROOT, FIDUCIARY COUNSEL, INC., AUGUSTUS T. ASHTON, E. B. CONNOLLY, PARKER MAXWELL, AND THE UNKNOWN HOLDERS OF $42,000 PAR VALUE OF BONDS SOUGHT TO BE AFFECTED BY THE SO-CALLED PLAN OF COMPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MILLER WALTON,
On His Own Behalf and as Attorney for his Co-petitioner.



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, Frank A. Berry and Miller Walton, respectfully show the Court:

I

Summary Statement

Note: The complete record is comprised of two Court of Appeals records numbered 10605 and 11174. References to them are by record number and page therein.

Petitioners seek review of a decision[1] (11174, pp. 63-68 that the Bankruptcy Act did not adopt the "equity precedents and practices" authorizing allowances of costs "as between solicitor and client," and a court of bankruptcy lacks jurisdiction to award solicitors' fees as equitable costs.

Petitioners are the attorneys who represented the successful appellants in *Wright* v. *Coral Gables,* 5 Cir., 137 F. 2d 192, and on certiorari, represented the successful respondents in *Coral Gables* v. *Wright,* 320 U. S. 729, 321 U. S. 753, 322 U. S. 768.

After the mandate of this Court was filed in the District Court (11174, pp. 13-15), petitioners submitted a petition (11174, pp. 21-34), which the District Court denied (11174, p. 50), and refused leave to amend (11174, p. 49), praying an award of attorneys' fees as equitable costs "as between solicitor and client." The allowance was sought on the basis that in acting successfully for two members of an affected class of creditors, petitioners conferred on the other members, who stood by awaiting the outcome, and had accepted, direct benefits of the value of approximately $250,000; and it was only right, just and equitable that they be compensated by all who benefited from the services (11174, pp. 21-34).

The class was comprised of minority creditors who did not accept, and most of whom vigorously opposed in the District Court, the so-called plan of composition, but all of whom became bound by the interlocutory decree of confirmation (10605, pp. 1829-1834), which scaled their claims proportionately, materially impaired their value, enjoined their enforcement, and constructively converted them into less valuable claims of smaller amounts (11174, pp. 21-34). The reason why they comprised the class is that the plan was initiated and fully completed as a voluntary, extra-

[1] *Berry* v. *Root,* 5 Cir., 148 F. 2d 945.

judicial plan of refunding and individual settlements, with the result that before the attempt to re-adopt and submit it to the District Court as a so-called plan of composition, all securities and money offered the majority creditors had been delivered to and accepted by them, and it was not proposed that their rights be adjusted, modified, changed or altered, in any respect; the sole object of the proceeding having been to "bludgeon into submission" the minority "with whom the city had not been able to make settlements satisfactory to itself."[2]

The legal services for which compensation was sought were rendered, first, in successfully prosecuting the appeals of petitioners' minority creditor clients, with the result that the Court of Appeals reversed and set aside the interlocutory decree on grounds that restored the claims not only to their former characters, but also to their former amounts, thereby materially increasing and adding to their value;[3] and, second, in successfully defending the certiorari proceeding in which the Court of Appeals decision was affirmed by equal division of this Court.[4]

The petition relied on the following underlying equities and substance, as distinguished from matters of form: The objections of petitioners' clients to confirmation of the plan contained no formal class suit allegations, nor did the clients expressly specify that they appealed in the interest of the whole class of creditors, the appeals having been in the names of only the individual clients. Nevertheless, by taking them, the clients assumed tem-

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[2] *Wright* v. *Coral Gables*, 5 Cir., 137 F. 2d 192.

[3] The claims were paid in full. Counsel for Fiduciary Counsel, Inc., and Augustus T. Ashton, so stated in his Court of Appeals Brief, and counsel for C. J. Root so stated in his oral argument to the Court of Appeals. (11174, pp. 67, 77)

[4] *Coral Gables* v. *Wright*, 321 U. S. 753, 322 U. S. 768.

porary control of the common rights of all the minority creditors and were under a duty fairly to represent those common rights, hence the appeals were, in reality and legal effect, prosecuted in a representative capacity, on behalf of the entire class. They sought no individual relief for the clients, but sought only to have the confirmation set aside. In final analysis, they were not from the denial of any individual claims of the clients, but were on the basis that every other minority creditor, as well as the clients, was wronged and injured by the confirmation. So far as the controlling issues were concerned, the rights of the clients and of the other minority creditors were inseparable. The success or failure of the appeals, and success or failure in defending the certiorari proceeding, were bound to have a substantial effect on the interests of all other minority creditors. The successful outcome vitiated and nullified the wrong and injury done all minority creditors by the interlocutory decree. The reversal and setting aside of the decree restored the claims not only to their former characters, but also to their former amounts, and added material value to the claims of all members of the class; whose inactive, non-appealing members stood by awaiting the outcome, and had demanded and accepted the benefits. In looking to substance, and not merely to form, equity should consider realistically the valuable benefits conferred, and for dominating reasons of justice, should reward petitioners for their vigilance and success in so exceptional a case (11174, pp. 21-34).

By the proffered amendment, petitioners sought to aver that no contracts for fixed fees had been made with the principal client, but he had paid them compensation that was less than a reasonable fee, and they had agreed that he be considered as settled with and discharged from further liability, but petitioners should, on their own account,

seek further payment from the other benefited creditors; and petitioners recognized that the partial compensation paid them should be credited proportionately against such reasonable fee as the Court might allow for the services (11174, pp. 45-48).

The only points considered by the District Court were its jurisdiction and the sufficiency of the petition (11174, p. 50). Without hearing any evidence, but deeming true all facts alleged, the petition was denied on the grounds: (1) the District Court, "sitting as a Court of Bankruptcy in a municipal composition proceeding does not have jurisdiction or authority to consider and grant such equitable relief," its "jurisdiction and power to award attorneys' fees" being "limited to those fees authorized by the Municipal Bankruptcy Act;" (2) "the facts alleged * * * do not entitle Petitioners to the relief asked upon equitable principles in that such benefits" as were received "were merely incidental" (11174, p. 50). The refusal of leave to amend was on the ground that the proffered amendment "would not in any wise strengthen the amended petition so as to render it adequate as a basis for the relief prayed," and would "serve no useful purpose" (11174, p. 49).

The Court of Appeals affirmed,[5] holding: (1) the petition was an effort by attorneys to obtain an allowance by the bankruptcy court "for defeating a municipal bankruptcy proceeding," the allowance to be charged proportionately against all creditors benefited thereby; (2) the "true question" was whether or not the court of bankruptcy could and should award a fee to counsel for a creditor "who obtains the dismissal of the bankruptcy proceeding," and assess the fee proportionately against all creditors of the same class, with equitable garnishments against the debtor to pay the several assessments; (3) a court of bankruptcy

[5] *Berry* v. *Root*, 5 Cir., 148 F. 2d 945.

"is not a court of equity," but is a statutory court created and governed by the Bankruptcy Act, and as to original bankruptcy proceedings, the Act "has not adopted the equity precedents and practices as to costs, including costs as between attorney and client, commonly called an allowance of attorney's fees;" (4) "The fees allowable for services in each kind of bankruptcy proceeding have been provided, and expressly or by implication others are excluded;" (5) there is no provision and no precedent for allowing a fee, to be assessed against all benefited, "for service in dismissing any form of bankruptcy proceeding;" (6) Chapter IX of the Act "carefully defines the attorney's fees that may be allowed, to be provided for in the plan of composition," and no others can be allowed; (7) Chapter IX does not provide that an attorney's fee may be allowed "for opposing and wholly defeating" a plan of composition, and "Since in a municipal composition case there is no estate or fund before the court, except what the plan may provide, it is not practical to assess one;" (8) "We understand, though it is not alleged, that because of improvement in general conditions in Florida and in the financial position of the City pending the litigation, the creditors will collect their unscaled bonds in full; but this benefit is not really due to the attorney's services so much as to the adventitious improvement in the City's finances;" (9) § 2a(18) of the Act, empowering courts of bankruptcy to "Tax costs and render judgments therefor" against "the successful party for cause," or "in part against each of the parties, * * * in proceedings under this Act," does not authorize the allowance of costs "as between solicitor and client," but is limited to "the costs fixed in the Act itself and to the usual cost allowances fixed in other applicable statutes and by the rules of the appellate courts;" (10) the proffered amendment does not

help petitioners' case; (11) when equitable costs "as between solicitor and client" are allowable, they should be sought "in the name of the party," and "Except where the law provides for a fee to be paid to *the attorney*, according to the better rule the attorney ought not to proceed for the contribution in his own name, but in the name and right of his client;" (12) "by releasing their client who employed and primarily owes them," petitioners "certainly do not strengthen their claim against others who did not employ them and ordinarily would owe them nothing, though benefiting by their services;" (13) *Sprague* v. *Ticonic Natl. Bank*, 307 U. S. 161, is not in point, because "There was no bankruptcy," and the decision was that "a court of equity" could entertain the application; (14) *Young* v. *Higbee Co.*, 324 U. S. 204, is not in point, "because it relates not to attorney's fees, but to the substantial rights of the parties to a reorganization," and the bankruptcy court was collecting and distributing assets under an "adopted plan of reorganization," and "did not dismiss the proceeding;" (15) "More nearly analogous" are the bankruptcy corporate reorganization decisions holding, although the courts had assets before them, that the provisions for fees in such proceedings are not intended to apply where the services of counsel do not produce a plan, but result in "a dismissal of the proceedings" (11174, pp. 63-68).

Petitioners submitted a petition for rehearing (11174, pp. 69-79) which was denied May 17, 1945 (11174, p. 80).

II

Statement of Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347(a)),

conferring on this Court jurisdiction to issue writs of certiorari to review judgments or decrees of the Circuit Courts of Appeals.

The decision sought to be reviewed was rendered April 25, 1945, by the United States Circuit Court of Appeals for the Fifth Circuit [6] (11194, pp. 63-68). A petition for rehearing (11174, pp. 69-79) was deniede May 17, 1945 (11174, p. 80).

The decision of the Court of Appeals affirmed (11174, pp. 63-68) a decree by the District Court of the United States for the Southern District of Florida, that the latter lacks jurisdiction, in a municipal composition proceeding under Chapter IX of the Bankruptcy Act, to "consider and grant" a petition praying an allowance of solicitors' fees as equitable costs "as between solicitor and client," for appellate services that conferred material benefits on all members of a class of creditors. The Court of Appeals decided that the allowance was sought for "defeating" and obtaining "the dismissal" of the "municipal bankruptcy proceeding," and that the District Court lacked jurisdiction to allow compensation, as equitable costs, for those services.

The questions presented by this Petition are important and controlling jurisdictional questions that have not been, but should be, settled by this Court. They involve: (1) the scope, extent and limits of the jurisdiction "in equity" and to assess, apportion and render judgments for "costs," with which courts of bankruptcy are invested by §§ 2a and 2a(18) of the Bankruptcy Act; (2) the jurisdiction of courts of bankruptcy to tax equitable costs "as between solicitor and client," for benefits conferred on a class of creditors by successful appellate proceedings in a municipal composition proceeding under

[6] *Berry* v. *Root*, 5 Cir., 148 F. 2d 945.

Chapter IX of the Act; (3) a complete misconception of the "true question" presented, and a resulting denial of the existence of an historic equity power exercised by courts of bankruptcy in numerous well considered decisions under the Bankruptcy Acts of 1841, 1867, 1898 and 1938; (4) the decision of a significant question of the equity power of courts of bankruptcy in a way probably in conflict with controlling principles enunciated by this Court, and also in conflict with decisions by other Circuit Courts of Appeals; (5) the propriety of a petition by affected attorneys praying an allowance of equitable costs "as between solicitor and client," directly to themselves, without any application by their immediate clients.

Counsel urges that the jurisdiction of this Court to issue a writ of certiorari to review the decision of the Court of Appeals is sustained by *Lau Ow Bew* v. *U. S.*, 144 U. S. 47; *Aztec Min. Co.* v. *Ripley*, 151 U. S. 79; *Forsyth* v. *City of Hammond*, 166 U. S. 506; *Warner* v. *New Orleans*, 167 U. S. 467; *Title Guaranty & Surety Co.* v. *U. S.*, 222 U. S. 401; *American United Mut. L. Ins. Co.* v. *Avon Park*, 311 U. S. 143; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510; *Ecker* v. *Western P. R. Corp.*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523; *Kelley* v. *Everglades Drainage Dist.*, 319 U. S. 415; *City of Coral Gables* v. *Wright*, 320 U. S. 729; *Young* v. *Higbee Co.*, 324 U. S. 204.

III

Questions Presented

1. Do §§ 2a and 2a(18) of the Bankruptcy Act, which invest courts of bankruptcy with jurisdiction "in equity" and to "Tax costs and render judgments therefor" against "the successful party for cause," or "in part against each

of the parties, * * * in proceedings under this Act," empower a court of bankruptcy to award solicitors' fees as equitable costs "as between solicitor and client," in a municipal composition proceeding under Chapter IX of the Act, for successful appellate services that conferred valuable benefits on all members of an affected class of creditors?

2. Is the allowance of solicitors' fees as equitable costs "as between solicitor and client," in appropriate situations, a part of the historic jurisdiction "in equity" of courts of bankruptcy?

3. Does the petition present an appropriate situation for the allowance of solicitors' fees to Petitioners, as equitable costs "as between solicitor and client?"

4. Is it permissible for affected attorneys to petition for an allowance of equitable costs "as between solicitor and client," directly to themselves, without any application by their immediate clients?

IV

Reasons Relied On for Allowance of Writ

1. The decision of the Court of Appeals is in direct conflict with controlling principles enunciated by this Court in *Trustees* v. *Greenough,* 105 U. S. 527; *Randolph* v. *Scruggs,* 190 U. S. 533; *Sprague* v. *Ticonic Natl. Bank,* 307 U. S. 161; *Securities & Exchange Comm.* v. *United States R. & I. Co.,* 310 U. S. 434; *American United Mut. L. Ins. Co.* v. *Avon Park,* 311 U. S. 143; *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.,* 312 U. S. 81, and *Young* v. *Higbee Co.,* 324 U. S. 204.

2. The decision sought to be reviewed was rendered by the Circuit Court of Appeals for the Fifth Circuit, and

is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Lacov*, 142 F. 960, the decision of the Circuit Court of Appeals for the Third Circuit in *In re Keystone Realty Co.*, 117 F. 2d 1003, the decision of the Circuit Court of Appeals for the Fourth Circuit in *Receivers* v. *Staake*, 133 F. 717, the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Swartz*, 130 F. 2d 229, and the decision of the Circuit Court of Appeals for the Eighth Circuit in *Summers* v. *Abbott*, 122 F. 36.

3. The questions presented are important and controlling jurisdictional questions involving the scope, extent and limits of the jurisdiction "in equity" and to assess, apportion and render judgments for "costs," conferred by §§ 2a and 2a(18) of the Bankruptcy Act, that courts of bankruptcy are empowered to exercise in municipal compositions under Chapter IX of the Act, and have not been, but should be, settled by this Court.

4. By misconceiving the "true question" presented and denying the existence of the historic equity power of courts of bankruptcy to allow solicitors' fees as equitable costs "as between solicitor and client," the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision.

5. The holding of the Court of Appeals that when equitable costs "as between solicitor and client" are allowable, they should be sought "in the name of the party," and it is not permissible for the affected attorneys to petition for the allowance directly to themselves, is in direct conflict with controlling principles enunciated by this Court in *Central R. & B. Co.* v. *Pettus*, 113 U. S. 116.

V

Prayer for Writ

A certified transcript of the entire record of the case in the Circuit Court of Appeals for the Fifth Circuit accompanies this petition, in compliance with Rule 38 of this Court, and is made a part hereof by reference.

WHEREFORE, Petitioners pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court of Appeals to certify and send up to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 11174, *Frank A. Berry and Miller Walton, Appellants,* v. *C. J. Root, Fiduciary Counsel, Inc., Augustus T. Ashton, E. B. Connolly, Parker Maxwell, and the unknown holders of $42,000 par value of bonds sought to be affected by the so-called Plan of Composition, Appellees,* to the end that said cause may be reviewed and the manifest errors of said Court of Appeals may be revised and corrected, as provided by law; that upon the hearing by this Court, the judgment of said Court of Appeals may be reversed, and that such further proceedings be had herein as may be provided by law and equity.

Respectfully submitted,

MILLER WALTON,
On his own behalf and as
Attorney for his co-petitioner.